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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. JOSHUA NEIL HARRELL, Defendant and Appellant.	A145661 (Solano County Super. Ct. Nos. FCR306522, FCR308925)

Following a jury trial in the above-referenced matters, which were consolidated for trial, defendant Joshua Neil Harrell was convicted of second degree commercial burglary and forgery arising out of an incident at Wells Fargo in March of 2014 (Solano County Superior Court Case No. FCR306522) (hereafter the Wells Fargo matter). He was also convicted of receiving stolen property and identifying information theft with a prior arising out of a separate incident in April of 2014 (Solano County Superior Court Case No. FCR308925) (hereafter the receiving stolen property/identity theft matter). The jury also found several related enhancement allegations to be true. The trial court sentenced defendant to a total term of five years eight months in state prison.

Defendant timely appeals, raising issues relating to representation of counsel and issues concerning the application of Proposition 47, the Safe Neighborhoods and Schools Act of 2014 (Proposition 47). For the reasons discussed below, we conclude that none of the issues has merit and, accordingly, affirm.

DISCUSSION

Representation of Counsel Issues

Defendant raises two issues relating to the representation of counsel. First, he maintains that the trial court erred in permitting him to represent himself without first obtaining a valid waiver of his Sixth Amendment right to the assistance of counsel. Second, he asserts that the trial court violated his Sixth Amendment and California due process rights to counsel of choice. We begin our analysis with an examination of the facts underlying the two claims.

Factual Background

On May 2, 2014, the trial court conducted the arraignment in the Wells Fargo matter and a preliminary hearing in another pending case against defendant. During the preliminary hearing, Vincent Maher, defendant's court-appointed counsel, advised the trial court that defendant wanted to represent himself. Defendant confirmed, "I'd like to proceed in propria persona and dismiss counsel at this time." The trial court deferred consideration of the request until the end of the preliminary hearing, at which point it offered to provide defendant self-representation paperwork. (*Faretta v. California* (1975) 422 U.S. 806.) Before it could do so, defendant indicated that he had changed his mind, explaining, "We weren't seeing eye to eye, me and him. He wasn't seeing things my way. I was feeling like he wasn't really helping me the way I needed, but I think something changed. And I want to work with him still."

Defendant declined to waive time on either matter. He later elaborated that he was "going to beat both of these cases" and was not interested in a plea deal because he had "too much on [his] record already" and had had bad experiences with plea agreements his "whole life."

On June 25, 2014, defense counsel Maher declared a doubt as to defendant's competence to stand trial. The trial court suspended the criminal proceedings against defendant and appointed two experts to evaluate his competency. Defendant vehemently objected, "There's nothing wrong with me. . . . I want to go to trial. It's my right. This is just delaying me. Now, I'm going to stay in jail even longer, and I want out of jail

right now. I don't want to be in here any longer. I want to go to trial. . . . Now this is gonna waive my time against my will when—and I'm going to be in jail longer. I want to be released. I want to go to trial. There's nothing wrong with me."

The two experts appointed by the trial court disagreed on whether defendant was competent to stand trial. The trial court then appointed a third expert, who concluded that defendant was competent to stand trial. At the next hearing on September 23, 2014, defense counsel Maher requested a jury trial on the competency issue. Defendant again objected, reiterating several more times that he wanted to proceed to trial on the underlying matters.

Subsequently, on January 7, 2015, defense counsel Maher withdrew his request for a jury trial on the competency issue and agreed to submit the issue on the three expert reports. The trial court found defendant competent to stand trial and reinstated the criminal proceedings against him. Defense counsel again reminded the trial court that defendant was not waiving time in any of his cases.

At the conclusion of the hearing, defendant advised the trial court, "I will need a *Marsden* motion." (*People v. Marsden* (1970) 2 Cal.3d 118.) At the ensuing hearing, defendant clarified, "I don't know if I need to do a *Marsden* motion. I just want to waive counsel." The trial court replied, "Let's do one thing at a time " and turned to the *Marsden* motion first. Defendant pointed to disagreements he had had with defense counsel Maher, including disagreements over the competency issue, whether he should accept a plea deal, and how long it was taking to get his cases to trial. Maher acceded to defendant's wishes and asked to be relieved, at which point the trial court granted the *Marsden* motion and denied the motion for self-representation. The trial court proceeded to appoint Robert Warshawsky to represent defendant.

On January 16, 2015, the trial court conducted arraignments and preliminary hearings in the receipt of stolen property/identity theft matter and another pending matter against defendant. At the outset of the proceedings, Warshawsky told defendant to "[b]e quiet," at which point the bailiff advised defendant, "If I have to tell you one more time I am going to take you to the back. That's final." Warshawsky admonished defendant to

"be quiet" on three more occasions, the last of which necessitated a break in the proceedings. The trial court warned defendant that if he continued his disruptive behavior, it would have no choice but to remove him from the courtroom.

On February 19, 2015, at a readiness conference in the Wells Fargo matter, Warshawsky declared a doubt as to defendant's competence. Defendant immediately interjected, "I want to do a *Marsden* motion," explaining "I am not going to sit here and keep suspending my court proceedings. It is not fair, Your Honor. I am completely competent. There is nothing wrong with me. He has no reason to base it. Just because I won't take a deal." Defendant continued, "I am not going to go through this again. I [would] rather represent myself than have another joker like this come around to represent me. I am not going to do it. [¶] . . . [¶] . . . It violates my due process rights, Your Honor. [¶] . . . [¶] . . . My due process rights to a speedy trial and it's being violated over and over again. There is nothing wrong with my competency. [¶] . . . [¶] . . . I am not going through this again. Keeps doing this for five months now. This is fucking bull shit."

At the outset of the ensuing hearing, the bailiff apologized for allowing defendant to use profanity in the courtroom. The trial court replied, "No, no, no. [Defendant] and I we have been doing this for months. This is not new. I wish that we could get to trial." The trial court reassured defendant, "You are very frustrated. [¶] . . . [¶] . . . And I understand. Have a seat."

At this point, defendant addressed the pending cases against him in considerable detail, describing various motions he wanted defense counsel Warshawsky to make. According to defendant, these motions included "a 1538.5 motion to suppress the evidence . . . under the 4th Amendment right of the Constitution, illegal search and seizure" and a motion to reduce some of the charges against him to misdemeanors under "[t]he new law, the Safe Neighborhood to Schools Act, Proposition 47, [Penal Code section] 1170.18, [which] states that if the value of the property is less than $950, it is to be a misdemeanor." Defendant argued that Warshawsky's failure to pursue these arguments demonstrated that "[h]e has been providing me ineffective assistance,"

explaining that "is one of the reasons why a person can file a *Marsden* motion." The trial court replied, "I know we are not there," noting that Warshawsky was defendant's second court-appointed counsel.

The trial court then turned to defendant's alternative request to represent himself and the following dialogue ensued:

"The Court: . . . . What I am thinking is because I have thought before about *Faretta* and self-representation.

"The Defendant: My 6th Amendment right of the Constitution, self-representation, is being violated.

"The Court: Maybe you would like to represent yourself—

"The Defendant: I would.

"The Court: —in this matter.

"The Defendant: And I have been discriminated against under the title to American Disability Act of 1989. And my 5th Amendment for discriminated against is being violated—being discriminated. And my due process rights are being violated all across the board. My 14th Amendment is being violated.

"The Court: This is a *Faretta* form that I would want to [*sic*] you to consider filling out as to whether you wish to represent yourself.

"The Defendant: I will be representing myself. And we are not going to be suspending the proceedings."

Defendant returned to the pending cases against him and described additional disagreements with Warshawsky over which arguments to pursue, reiterating that he was not willing to accept a plea deal and wanted to get the matter to trial. Defendant told the trial court, "I am done. I am done. And I will be representing myself. I am not going to have another person like him represent me again. And I have every reason and every right to."

Defendant acknowledged, "I am bipolar" and "have emotional issues. But as far as competency, that is not an issue." The trial court observed that it was "thinking you may be capable of representing yourself," referencing its five months of interactions with

defendant and the prior competency proceeding. Defendant responded, "I am going to be representing myself. You will get the briefs today. I have been ready and waiting to represent myself."

At this point, the trial court inquired whether defense counsel Warshawsky wished to be heard. Warshawsky replied, "Candidly, . . . the reason I was concerned about his competency is because he perseverates on certain issues." Defendant immediately cut Warshawsky off, at which point the trial court admonished him, "If you are going to represent yourself, you are definitely going to have to follow the rules." Defendant responded, "Okay. You are right, Your Honor. I apologize." Warshawsky then explained that when he and defendant disagreed on legal issues, defendant "just gets mad and yells and gets louder and louder and more forceful." Warshawsky acknowledged, however, that some of defendant's legal arguments were colorable, noting that "if [defendant] wants to represent himself and he does have a theory . . . that voids completely the issue of whether he can cooperate with counsel."

After hearing from Warshawsky, the trial court advised defendant that it was "leaning towards letting you represent yourself because I want to have this go to trial," concluding the problem was not defendant's competence but rather his "capacity to allow a lawyer to work for you." Warshawsky agreed with the trial court's assessment and noted that "given [defendant's] now unequivocal assertion of representing himself [under] *Faretta v. California*, quite frankly, I think the Court's hands are tied." Accordingly, the trial court granted defendant's motion for self-representation, subject to an examination by another expert to confirm defendant's ability to represent himself. The trial court maintained the trial date of March 2, 2015, which was then just seven court days out.

Defendant thanked the trial court and proceeded to inquire whether there was "any possible way that I can contact my family who lives in Belize . . . [¶] . . . because I may want to have—my mother has money for a retainer fee to hire an attorney." The trial court replied, "Well, I would not suggest you do that," inquiring why defendant would want to do so. Defendant answered, "I am a little scared. But I have I think—I have a

good case. I hope I do. And, you know, I am just scared of ending up something stuck in prison for a very long time." The dialogue continued:

"The Court: People pay that man right there next to you a lot of money on the outside to represent them. So you got his services compliments of the county, and that hasn't worked out for you. [¶] I can tell you that when your mother goes about to shop and find an attorney, his name is going to come up in the community as someone extremely—

"The Defendant: I am going to get someone outside—I don't trust—am going to get someone outside of Solano County.

"The Court: Well, you can get someone from any county you want.

"The Defendant: Right.

"The Court: You are not going to get a better lawyer. And your mom is going to spend the money for it. Probably going to tell you the same thing to end up back here telling me 'I don't want that lawyer that I hired.' [¶] So I know it is not your money that your mom is going to be spending, but you are telling me you want to represent yourself.

"The Defendant: I do want to represent myself.

"The Court: Then let's go forward.

"The Defendant: But, again, Your Honor, would I be able to contact my family just in case?

"The Court: Hold on a minute.

"The Clerk: Next Thursday is the date of [the trial management conference].

"The Court: Right. Here is the problem—I will give you—authorize you a collect phone call to your home—

"The Defendant: Belize.

"The Court: Belize. Two of them from the jail.

"The Defendant: Okay.

"The Court: But if—again, you understand the problem—

"The Defendant: Your Honor—

"The Court: —if you get to hire a new lawyer, it is another continuance.

"The Defendant: The jail phone [won't] allow out-of-the-country phone calls, so that has been my issue. That has been my issue for a long time now is not being able to have contact with my family. My mother lives on a little island in the country of Belize, and she owns a resort. And, you know, she is busy—tied up there on the island with the resort and stuff. [¶] I have not been able . . . to contact her to get an attorney. But I tried to have [Warshawsky] call her. I was under the wrong impression. I was going to have her pay him, and he says, 'No, I am a court-appointed attorney.' You know. Whatever. But—

"The Court: See, he is a very ethical man. He is not interested in taking your mother's money. So—but that is up to you. . . . I can't help you if you can't make a collect phone call to Belize."

The trial court returned to the issue of self-representation, warning defendant that there were some disadvantages to representing himself, including the inability to raise ineffective assistance of counsel on appeal and limited contact with the outside world. The trial court then asked defendant, "Are you are sure you want to represent yourself?" Defendant responded, "Yes, I do. I am positive. I am positive."

The trial court emphasized, "You understand I have to advise you it is against your best interest for all the reasons I just said." Defendant replied, "I know. I got a fool for an attorney now," immediately adding "[t]hat is a joke." The trial court returned to the disadvantages of self-representation, emphasizing the practical difficulties defendant would encounter if he elected to testify at trial and noting that the court would not be able to provide him legal advice.

On February 26, 2015, at the trial management conference, the trial court consolidated the Wells Fargo matter with the receipt of stolen property/identity theft matter, and the prosecution filed a single, consolidated information. Defendant pled not guilty to all of the charges against him and, when asked whether he waived time, replied, "Never."

At the conclusion of the hearing, defendant told the defense investigator, "you will get paid. My mother will pay you." The trial court clarified, "No, the Court is paying

him. [¶] . . . [¶] I've decided to let the investigators continue assisting you. Although you fired your lawyer, I'm keeping the investigative firm on, and I'm agreeing that they can sit with you at trial to help you manage all of this paper, right, and make sure that they get you dressed out for clothing and help you out and get ready for trial." Defendant replied, "Thank you, your Honor. You're the best." He reassured the trial court, "I'm not going to let you down this time. In the past, you know, . . . I messed up, but I think I got it now. I got all the tools I need now."

On February 27, 2015, Robert E. Wagner, Ph.D., the expert appointed by the trial court to evaluate defendant's ability to represent himself, submitted a detailed report concluding defendant was both capable of representing himself and competent to waive his right to counsel. On March 2, 2015, at the outset of the trial, the trial court acknowledged receipt of the report and directed that it be filed under seal.

The trial court also acknowledged receipt of defendant's nine-page, written *Faretta* form, which defendant had previously completed and mailed to the court. Among other things, the form advised defendant of the many disadvantages of self-representation. The form reflects that defendant completed it on February 19, 2015, signed it in 2 different places, and initialed its various admonishments in 13 more places. After directing that the form be filed, the trial court advised defendant, "So, the *Faretta* motion, again, you're representing yourself on the two cases that we have remaining, and if you at any point in the proceedings decide you want to stop representing yourself, you need to let me know, okay?" Defendant responded, "Okay."

Self-Representation

Defendant claims that the record is insufficient to establish a valid waiver of his Sixth Amendment right to the assistance of counsel and, hence, that the trial court erred when it allowed him to represent himself at trial. The law governing such claims is well established.

"A defendant in a criminal case possesses two constitutional rights with respect to representation that are mutually exclusive. A defendant has the right to be represented by counsel at all critical stages of a criminal prosecution. [Citations.] At the same time, the

United States Supreme Court has held that because the Sixth Amendment grants to the accused personally the right to present a defense, a defendant possesses the right to represent himself or herself. [Citation.]

"The United States Supreme Court has concluded in numerous cases and a variety of contexts that the federal Constitution requires assiduous protection of the right to counsel. The right to counsel is self-executing; the defendant need make no request for counsel in order to be entitled to legal representation. [Citation.] The right to counsel persists unless the defendant affirmatively waives that right. [Citation.] Courts must indulge every reasonable inference against waiver of the right to counsel." (*People v. Marshall* (1997) 15 Cal.4th 1, 20.)

"The requirements for a valid waiver of the right to counsel are (1) a determination that the accused is competent to waive the right, i.e., he or she has the mental capacity to understand the nature and object of the proceedings against him or her; and (2) a finding that the waiver is knowing and voluntary, i.e., the accused understands the significance and consequences of the decision and makes it without coercion." (*People v. Koontz* (2002) 27 Cal.4th 1041, 1069–1070 (*Koontz*).) "On appeal, we examine de novo the whole record—not merely the transcript of the hearing on the *Faretta* motion itself—to determine the validity of the defendant's waiver of the right to counsel." (*Id.* at p. 1070.)

In the present matter, while defendant alludes to his "emotional and psychological instability," he significantly does not challenge the first requirement for a valid waiver—namely, that he had the mental capacity to understand the nature and object of the proceedings against him. (*Koontz, supra,* 27 Cal.4th at p. 1069.) Instead, defendant focuses on the second requirement for a valid waiver, arguing that "the insufficient record" fails to establish that his waiver was "knowing, intelligent, and voluntary." (*Id.* at pp. 1069–1070.) Based on our review of the entire record, as summarized in detail above, we cannot agree.

Contrary to defendant's assertion, the record fails to establish that the trial court "actually raised *Faretta* and encouraged self-representation." Rather, the trial court turned to the question of self-representation only after defendant had already broached

the issue on three separate occasions, most recently with his comment that he would "rather represent myself than have another joker like this come around to represent me." Defendant's attempt to characterize his request to represent himself as "not unequivocal" and "made out of a 'temporary whim' and/or 'frustration' and/or in 'passing anger or frustration' " is similarly unavailing. Suffice to say, during the course of the proceedings, defendant repeatedly and unequivocally reaffirmed his desire to represent himself.

Nor does the record support defendant's assertion that the trial court "failed to advise [him] adequately." "No particular form of words is required in admonishing a defendant who seeks to waive counsel and elect self-representation; the test is whether the record as a whole demonstrates that the defendant understood the disadvantages of self-representation, including the risks and complexities of the particular case." (*Koontz, supra*, 27 Cal.4th at p. 1070.)

In the present matter, defendant addressed the pending cases against him at great length and described the various motions and arguments he wanted defense counsel to pursue. And, while admittedly made difficult by defendant's constant interruptions, the trial court orally advised him of several disadvantages of self-representation, including the inability to raise ineffective assistance of counsel on appeal, limited contact with the outside world, the practical difficulties he would encounter if he elected to testify at trial, the fact that the court would not able to provide him legal advice, and the requirement that he abide by the same rules as counsel. In addition, defendant reviewed, initialed, signed, and mailed to the trial court a written nine-page, written *Faretta* form describing the disadvantages of self-representation.

In short, having reviewed the entire record, we are confident that defendant understood not only the disadvantages of self-representation but also the risks and complexities of the pending cases against him. (*Koontz*, *supra*, 27 Cal.4th at pp. 1069–1070.) We therefore conclude that his waiver of his Sixth Amendment right to counsel was knowing and voluntary and, hence, valid. (*Ibid*.)

Right to Counsel of Choice

Defendant also asserts that the trial court violated his Sixth Amendment and California due process rights to counsel of choice. The record belies this assertion.

At no point in the proceedings did defendant request representation by counsel of his choice. Rather, immediately after the trial court granted his request for self-representation, defendant inquired whether there was "any possible way that I can contact my family who lives in Belize . . . . [¶] . . . [¶] . . . because I may want to have—my mother has money for a retainer fee to hire an attorney." As noted above, self-representation and representation by counsel are mutually exclusive, and, thus, the trial court properly inquired whether defendant did, in fact, want to represent himself, to which defendant confirmed, "I do want to represent myself."

Defendant explained that he wanted to contact his family "just in case." At this point, the trial court authorized defendant to make two collect telephone calls from the jail to Belize. The trial court also noted that if defendant were to retain counsel, it would necessitate another continuance, something defendant had vehemently opposed throughout the proceedings. While defendant stated that he had had problems making out-of-the-country telephone calls from the jail, it appears that he was ultimately able to contact his mother. Specifically, at the ensuing trial management conference, defendant told the defense investigator, "you will get paid. My mother will pay you." The trial court responded that that would not be necessary, as it was paying the investigator.

Defendant confirmed to Dr. Wagner that the possibility of retaining counsel was, at most, a fall back plan to self-representation. According to defendant, "if he needed additional help he would ask for it" and "his mother would help out by getting a lawyer for him if that proved necessary."

In short, at no point did defendant indicate that he, his mother, or anyone else was actively attempting to retain counsel to represent him. Nor did defendant request a continuance to allow more time to do so. To the contrary, at the trial management conference on February 26, 2015, just two court days before trial, defendant again reiterated that he would "[n]ever" waive time. Moreover, notwithstanding the trial

court's express admonishment to defendant at the outset of trial to advise it "if you at any point in the proceedings decide you want to stop representing yourself," defendant never did so. On this record, defendant's assertion that he was deprived of his right to counsel of choice fails.

Proposition 47 Issues

Prior to sentencing, defendant moved to have his felony convictions for second degree commercial burglary, forgery, receiving stolen property, and identifying information theft with a prior reduced to misdemeanors pursuant to Proposition 47. The trial court reduced the receiving stolen property conviction to a misdemeanor but denied the motion as to the remaining three convictions. On appeal, defendant argues that the remaining convictions should also have been reduced to misdemeanors pursuant to Proposition 47. We address each conviction in turn.

Second Degree Commercial Burglary Conviction

Proposition 47 reduced second degree commercial burglary under section 459 to the misdemeanor of shoplifting where the defendant "enter[s] a commercial establishment with intent to commit larceny while that establishment is open during regular business hours" and where the value of the property taken or intended to be taken does not exceed $950. (Pen. Code, § 459.5, subd. (a); *People v. Sherow* (2015) 239 Cal.App.4th 875, 879.)

In this case, the jury was properly instructed that to convict defendant of second degree commercial burglary, it had to find that property in question was worth more than $950. Thus, the jury's guilty verdict necessarily entailed a determination that the property defendant intended to take when he entered Wells Fargo was worth more than $950. The evidence presented to the jury was more than sufficient to support this determination. Specifically, defendant approached a bank teller and attempted to cash a check that had originally been made payable to a karate studio in the amount of $120 but which had been altered to be made payable to defendant in the amount of $1,120. Under these circumstances, the trial court properly declined to reduce the second degree burglary conviction to a misdemeanor pursuant to Proposition 47.

Forgery Conviction

Proposition 47 classifies forgery as a misdemeanor where the value of the forged instrument does not exceed $950, except when the defendant "is convicted of both forgery and identity theft, as defined in [Penal Code] Section 530.5." (Pen. Code, § 473, subd. (b).) Because defendant was convicted of both forgery and identifying information theft with a prior (Pen. Code, § 530.5, subd. (c)(2)), the trial court properly declined to reduce his forgery conviction to a misdemeanor pursuant to Proposition 47.

Identifying Information Theft with a Prior Conviction

Contrary to defendant's assertion, nothing in Proposition 47 mandates that convictions under Penal Code section 530.5 be deemed misdemeanors. Rather, as just noted, such convictions actually disqualify defendants convicted of forgery from Proposition 47 treatment under section 473, subdivision (b).

DISPOSITION

The judgment is affirmed.

_____
McGuiness, P.J.

We concur:

_____
Pollak, J.

_____
Siggins, J.